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FILED  
U.S. DISTRICT COURT  
NORTHERN DIST. OF TX.  
FT. WORTH DIVISION

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

2009 OCT 20 AM 10:10

CLERK OF COURT

JOSE MERCED, PRESIDENT,  
TEMPLO YORUBA OMO  
ORISHA TEXAS, INC.,

Plaintiff,

vs.

THE CITY OF EULESS,

Defendant.

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Civil Action No. 4-06CV-891-A

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**DEFENDANT'S RESPONSE TO PLAINTIFF'S OPPOSED MOTIONS FOR  
ATTORNEYS' FEES, TAXABLE COSTS AND UNTAXABLE COSTS**

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COMES NOW THE CITY OF EULESS, Defendant and files its Response to Plaintiff's Motion for Attorneys' Fees, Taxable Costs and Untaxable Costs, and would respectfully show the following:

**I. INTRODUCTION**

1. Plaintiff Merced's trial and appellate counsel correctly state the law regarding the award and reasonableness of attorney fees – it is controlled by state law. *Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5<sup>th</sup> Cir. 2002). That is why, in spite of the Fifth Circuit's Order dated September 14, 2009<sup>1</sup>, neither trial nor appellate counsel are entitled to attorney's fees because they were never pled by Merced, no timely motion to amend pleadings or pretrial order has been filed by Merced, Merced failed to timely designate experts on the issue of attorney fees and thus has presented no competent evidence in

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<sup>1</sup> See Case 4:06-cv-00891-A, Document 148.

support of fees, the issue was not tried by consent, Eulless objected to Merced's request for fees as soon as it learned the request would be made, and awarding fees at this late stage amounts to unfair surprise, and is thus patently prejudicial to Eulless. *See Swate v. Medina Cmty. Hosp.*, 966 S.W.2d 693, 701 (Tex.App.—San Antonio 1998, pet. denied).

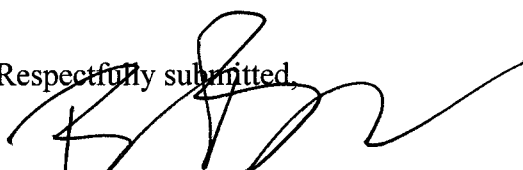
2. Merced waited almost three years<sup>2</sup> to put Eulless on notice that he would seek the recovery of attorney fees. Such a delay is inexcusable and precludes Merced from obtaining an award of fees when nothing prevented him from timely asserting them in the first place.

**PRAYER**

WHEREFORE PREMISES CONSIDERED, Defendant-Appellees, City of Eulless request the Court deny Plaintiff-Appellant, Jose Merced's Opposed Motion(s) For Attorney's Fees, Taxable Costs and Untaxable Costs.

Respectfully submitted,

By:

  
BRADFORD E. BULLOCK  
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**COUNSEL FOR DEFENDANT**

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<sup>2</sup> Merced filed his Original Complaint on **December 22, 2006**. See Case 4:06-cv-00891, Document 1.

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**LOCAL COUNSEL FOR DEFENDANT**

**CERTIFICATE OF SERVICE**

I certify that on October 19, 2009, a complete and correct copy of the **DEFENDANT'S RESPONSE TO PLAINTIFF'S OPPOSED MOTIONS FOR ATTORNEYS' FEES, TAXABLE COSTS AND UNTAXABLE COSTS** was served upon the following counsel of record in accordance with the Federal Rules of Civil Procedure:

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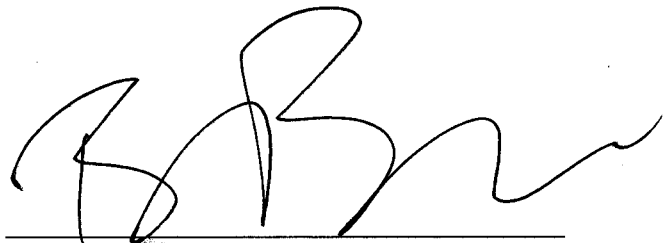
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A handwritten signature in black ink, appearing to read 'W. M. McKamie', is written over a horizontal line.

**WILLIAM M. MCKAMIE  
BRADFORD E. BULLOCK**